Petition

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81-1995

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No.

LOUIE L. WAINWRIGHT,
Secretary, Department
of Corrections,

Petitioner,

-v-

JAMES DUPREE HENRY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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Questions Presented for Review

1. Whether a sentence of death should be vacated because the jury was permitted to consider a nonstatutory aggravating circumstance, then permissible under Florida law, and there were no statutory mitigating circumstances.

2. Whether on collateral attack the assumed futility of objection at the time of trial is sufficient "cause" to excuse Respondent's failure to make timely objection to an alleged erroneous jury instruction.

3. Whether a trial judge because of an objection having been lodged to certain testimony the day before is required to know on the next day, absent an objection thereto, that Respondent would object to an instruction allowing consideration of this evidence.

4. Whether a procedural default in the instant case can be excused because it was determined that the Florida Supreme Court had excused a procedural default in an earlier unrelated case.

5. Whether the announcement by the lower court of a new principle of constitutional law, i.e., that it is error to allow a jury in a capital case to consider a nonstatutory aggravating circumstance even though permissible under Florida law at the time of trial, is contrary to the decision in Proffitt v. Florida, 428 U.S. 242 (1976).

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Attorney General of the State of Florida petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The original opinion of the Florida

Supreme Court affirming respondent's conviction and sentence is reported as Henry v. State, 328 So.2d 430 (Fla. 1976). The opinion of the Florida Supreme Court affirming an order denying post-conviction relief is reported as Henry v. State, 377 So.2d 692 (Fla. 1979).

The opinion of the Court of Appeals, Fifth Circuit, is reported as Henry v. Wainwright, 661 F.2d 56 (5th Cir. 1981).*

*Former Fifth Circuit Case, Section 9(1) of Public Law 96-452-Oct. 14, 1980.

JURISDICTIONAL STATEMENT

The judgment of the Fifth Circuit Court of Appeals was entered on November 12, 1981. Petition for Rehearing and Suggestion for Rehearing en banc was denied on January 26, 1982.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND OTHER PROVISIONS INVOLVED

The Eighth Amendment to the federal constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the federal constitution provides in pertinent part:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they

> reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Florida death penalty statute, § 921.141, F.S. (1973), in effect at the time of respondent's trial in June 1974 is as follows:

> 921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.--
>
> (1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.--Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by §775.082. The proceeding shall be conducted by the trail [sic]

jury as soon as practicable. If the trial jury has been waived or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) and (7) of this section. Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the constitutions of the United States or the State of Florida. The state and the defendant or his counsel shall be permitted to present argu-

ment for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY.--After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6);

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life [imprisonment] or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.--Notwithstanding the recommendation of a majority of the jury, the court after weighing the

aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (6), and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (7), to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (6) and (7) and upon the records of the trial and sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life

imprisonment in accordance with §775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE.--The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record unless the time is extended by the supreme court for good cause shown. Such review by the supreme court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.

(5) AGGRAVATING CIRCUMSTANCES.--Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(6) MITIGATING CIRCUMSTANCES.--Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct of consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

Rule 3.390(d), Florida Rules of Criminal Procedure, provides as follows:

(d) No party may assign as error grounds of appeal the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects, and the grounds of his objection. Opportunity shall be given to make the objection out of [the presence of] the jury.

STATEMENT OF THE CASE

A. History of the Case

Respondent was convicted and sentenced to death for the crime of first degree murder on June 26, 1974. The Florida Supreme Court affirmed both conviction and sentence. 328 So.2d 430. This Court denied a petition for writ of certiorari on November 8, 1976. 429 U.S. 951. Rehearing was denied February 22, 1977. 429 U.S. 1124.

Pursuant to Gardner v. Florida, 430 U.S. 349 (1977), respondent filed an application for relief in the Florida Supreme Court on or about August 8, 1977. This was denied by order of that court dated January 30, 1978, and rehearing was denied by order dated December 5, 1978.

On or about May 7, 1979, respondent filed a second petition for writ of certiorari in this Court which was denied by order dated October 1, 1979. Rehearing was denied on October 29, 1979.

On November 2, 1979, respondent filed a motion for post-conviction relief in the Circuit Court, in and for Orange County, Florida. A hearing was held on November 16, 1979, following which the trial judge entered an order denying the motion for post-conviction relief. On appeal, the Florida Supreme Court affirmed the order of the state court trial judge denying post-conviction relief. 377 So.2d 692.

Petition for writ of habeas corpus was filed in federal district court on November 27, 1979. Following a hearing

begun on November 30, 1979 and thereafter completed on January 11, 1980, the district court entered its order granting the petition for writ of habeas corpus on February 14, 1980. Petition for rehearing was denied by order dated February 25, 1980.

On appeal, the Eleventh Circuit Court of Appeals (Former Fifth Circuit Case) affirmed the order of the district court granting the petition for writ of habeas corpus. Petition for Rehearing and Suggestion for Rehearing en banc were denied on January 26, 1982. By order dated February 3, 1982, the lower court stayed its mandate to and including February 25, 1982, which was continued by order entered by Mr. Justice Powell on

February 23, 1982, pending the timely filing and disposition of this petition for writ of certiorari.

B. Statement of the Facts

The facts as found by the Florida Supreme Court (328 So.2d 430) are as follows:

> Appellant was indicted for murder in the first degree in that he did with premeditated design kill and murder Z. L. Riley by suffocating him with a gag, and was found guilty. The majority of the jury recommended that the death penalty be imposed and the trial judge, having considered the mitigating and aggravating circumstances, sentenced appellant to death.
>
> The victim was found in the bedroom of his home bound and gagged with his throat cut. Two double edge razor blades were lying near his body covered with dried blood.

The pockets of the deceased's pants were turned inside out, but no wallet, money or personal effects were found. Appellant's thumb print was found in the victim's bedroom. In performing an autopsy on the body of the deceased, Dr. Hegert found extensive head and facial wounds, including two fractures of the jaw and mild to moderate brain hemorrhaging caused by "blunt force," cuts on the hands, and two deep cuts four and five inches long and several more cuts about the neck consistent with the use of a razor blade. The doctor determined that the actual cause of death was a gag placed tightly under the tongue of the deceased so as to force the tongue back into the throat, cutting off the airway and suffocating the victim.

At the time of the murder, appellant lived next door to the victim. When Officer Ferguson went to arrest appellant at his residence, several days after the murder appellant jumped Ferguson, took

his gun, shot Ferguson twice and then fled. He was found an hour later hiding behind a dryer machine, arrested, taken to the Orlando Police Station and advised of his rights. Before interrogation, he was fully advised of his rights, he signed a waiver card, and he advised the officers that he had killed the deceased, and gave the officers full details of the murder. The officers present testified that no promises or threats were made, and that appellant was not offered any hope of leniency or other reward to induce his statements.

Four days before the trial, he filed a motion to suppress his confession. Before trial, the trial judge conducted a lengthy hearing on the voluntariness of the confession, after which the trial judge denied the motion to suppress. At the conclusion of the state's case, defense counsel moved for a directed verdict of acquittal which was denied. Relying solely upon the defense of insufficient

> evidence, appellant did not testify nor call other witnesses. After deliberation for one hour, the jury returned a verdict of guilty. The sentence advisory hearing was then conducted, after which the jury returned a recommendation of the death penalty.

Id. at 430, 431.

REASONS FOR GRANTING THE WRIT

1. The lower court's determination of error because respondent's trial jury was permitted to consider a nonstatutory aggravating circumstance is based on Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980), cert.granted, ___ U.S. ___, 101 S.Ct. ___, 69 L.Ed.2d, 50 U.S.L.W. 3212 (Oct. 6, 1981). For the lower court's reliance on Stephens, see 661 F.2d 59, n. 8.

Not only did the lower court disregard the fact that a jury under

Florida law at the time respondent was tried was permitted to consider non-statutory aggravating circumstances under certain conditions but the added fact that this Court had granted certiorari in Stephens seems to have made little, if any, impression on the lower court.

Because it is recognized that the issue in the instant case is similar to the issue raised in Stephens, petitioner will refrain from submitting a detailed legal argument in support of its position. It is urged, however, that because similar issues are involved this Court should accept jurisdiction and hold the petition pending its determination of Stephens on the merits. Precedent for this is found in Keney v. New York, 388 U.S. 440 (1967).

2. In a rather obvious effort to supply the "cause" requirement of Wainwright v. Sykes, 433 U.S. 72 (1977) the lower court excused respondent's failure to comply with Florida's contemporaneous objection rule on the ground of futility. Note the following:

> At that time, the trial judge overruled the objection and made clear his intention to allow such evidence to go to the jury. Id. In light of this ruling, any further objection to the jury instructions permitting consideration of nonstatutory aggravating factors would have been futile.

661 F.2d, at 58.

Just recently this Court decided Engle v. Isaac, Case No. 80-1430 and United States v. Frady, Case No. 80-1595. Engle rejected the claim that a perceived futility of objection is sufficient to supply the "cause" requirement of Sykes.

Note the following:

> We note at the outset that the futility of presenting an objection to the state courts cannot alone constitute cause for a failure to object at trial. If a defendant perceives a constitutional claim and believes it may find favor in the federal courts, he may not bypass the state courts simply because he thinks they will be unsympathetic to the claim. Even a state court that has previously rejected a constitutional argument may decide, upon reflection, that the contention is valid. Allowing criminal defendants to deprive the state courts of this opportunity would contradict the principles supporting Sykes.

Slip op. 21, 22.

Engle was considered together with Perini v. Bell and Engle v. Hughes, which were on certiorari to the same court. Engle, slip op. 1. In treating the respondent Hughes' claim for relief the

Court pointed out that in the trial court the judge had instructed the jury that Hughes bore the burden of proving this defense by a preponderance of the evidence. This had to do with the defense of self-defense. But, as the Court noted, Hughes did not specifically object to this instruction. However, in a footnote it was pointed out that Hughes' counsel did register a general objection to the entire charge because the court was then operating under a new code. Engle, slip op. 4, n.6. Notwithstanding the general objection, this Court found that the procedural default waived his claim. In the instant case, there was no objection, general or otherwise, lodged to the instruction, the giving of which formed the basis for the

lower court's affirmance of the district judge's order granting the writ. The lower court does not contend to the contrary. Indeed, no objection was raised to the challenged instruction on respondent's direct appeal to the Florida Supreme Court. Henry, 328 So.2d 430. Subsequently, on appeal from an order denying post-conviction relief, the Florida Supreme Court refused to excuse the default. Henry, 377 So.2d 692. Consequently, the only viable issues before the federal habeas court were ineffective assistance of counsel and a challenge to the death penalty on the ground that it was imposed in an arbitrary, capricious and irrational manner in this jurisdiction based on geography, poverty, and other arbitrary

factors. See State v. Matera, 266 So.2d 661 (Fla. 1972), Sullivan v. State, 372 So.2d 938 (Fla. 1979). The rationale of Engle that respondents who fail to comply with an Ohio rule mandating contemporaneous objections to jury instructions may not challenge the constitutionality of those instructions in a federal habeas proceeding unmistakably controls the instant case. The Court is asked to compare Ohio R.Cr.Proc. 30 with Rule 3.390(d), Florida Rules of Criminal Procedure.

As Engle aptly restates, this Court has long recognized that a mere error of state law is not a denial of due process. Otherwise, every erroneous decision by a state court on state law would find its way to this Court in the guise of a fed-

eral constitutional question. Gryger v. Burke, 334 U.S. 728 (1948). Engle, slip op., at p. 12, n.21. However, the lower court put its unmistakable stamp of approval on the order of the district court which granted the petition for writ of habeas corpus based on an alleged error of state law. In the district court's Memorandum of Decision the following is found:

> The erroneous instruction effectively denied the Petitioner the right to a sentencing hearing conducted in compliance with the applicable statutes of the State of Florida. The error, therefore, denied the Petitioner due process and equal protection of the law of the State of Florida.

(R Vol.VII, p. 1174)*

*Reference is to the record on appeal filed in the lower court.

Of course, to supply the "cause" requirement of Sykes, the district court found that the state court trial judge should have known that respondent objected to the instruction because of an objection made to Officer Ferguson's testimony on a prior occasion. And the fact that Purdy v. State, 343 So.2d 4 (Fla. 1977) and Elledge v. State, 346 So.2d 998 (Fla. 1977) were decided long after respondent's trial was ignored by the district court and the lower court.

3. The lower court now requires that a state trial judge possess the psychic ability to read the mind of defense counsel and then practice law in his behalf. Note the following:

> As the district court noted, the objection to the arresting officer's testimony was suf-

> ficient to put the trial judge on notice that the defense would object to any instructions allowing consideration of this evidence For these reasons, we hold that the failure of Henry's counsel to object to the jury instructions does not preclude federal habeas review of the alleged error in the instructions.

661 F.2d, at 58. Of course, the purpose behind this legal legerdemain is to avoid the impact of Wainwright v. Sykes, 433 U.S. 72 (1977). The absurdity of the lower court's reasoning becomes apparent upon a logical extension thereof. Assume arguendo, the trial judge did know that defense counsel wanted to object to a particular jury instruction. Does this mean that the trial judge is obligated to enter an objection in the record in behalf of the defendant? Or, are we to suppose that the possession of such

knowledge by the trial judge, absent any objection, is sufficient to preserve the issue for review in habeas corpus? This is ridiculous and merits no further comment.

If permitted to stand, the reasoning of the lower court effectively obliterates Florida's contemporaneous objection rule. See Rule 3.390, Florida Rules of Criminal Procedure, requiring timely objection to a jury instruction in order to preserve the issue for appellate review. The reasoning of the lower court cannot be sustained because it is in obvious conflict with the position taken by this Court in Sykes. Note the following:

The contemporaneous-objection rule itself is by no means peculiar to Florida, and deserves greater respect than Fay gives it, both for the fact that it is employed by a coordinate jurisdiction within the federal system and for the many interests which it serves in its own right.

* * * * *

The failure of the federal habeas courts generally to require compliance with a contemporaneous-objection rule tends to detract from the perception of the trial of a criminal case in state court as a decisive and portentous event. . . . Society's resources have been concentrated at that time and place in order to decide, within the limits of human fallibility, the question of guilt or inno-innocence of one of its citizens. Any procedural rule which encourages the result that those proceedings be as free of error as possible is thoroughly desirable, and the contemporaneous-objection rule

> surely falls within this classification.

433 U.S., at 88, 90.

The real issue in the present case is whether respondent should be permitted to attack his conviction on the basis of an instruction that was proper under the law at the time of his trial and that was neither objected to at trial nor challenged on appeal. Of course, as previously stated, the lower court answers in the affirmative because, so the reasoning goes, the trial judge was supposedly aware that defense counsel objected to the instruction. It is submitted that the position of the lower court is in unmistakable conflict with the rationale of Henderson v. Kibbe, 431 U.S. 145 (1977). Note the following:

> It is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court.
>
> The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal. The question in such a collateral proceeding is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process," Cupp v. Naughten, 414 US, at 147, 38 L.Ed.2d 368, 94 S.Ct. 396, not merely whether "the instruction is undesirable, erroneous, or even 'universally condemned,'" id. at 146, 38 L.Ed. 2d 368, 94 S.Ct. 396.

431 U.S., at 154.

4. The opinion of the lower court puts a new wrinkle in the Sykes rule. Note how this is done:

> Under Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), failure to comply with a state procedural rule, such as a contemporaneous objection rule, bars federal habeas review of alleged federal constitutional error in admission of the evidence absent a showing of cause for noncompliance and actual prejudice. Appellant Wainwright points out that Henry's counsel failed to object to the trial judge's instructions to the jury as required by Florida's contemporaneous objection rule and thereby had waived any claim of error in the instructions. This circuit, however, has held that procedural defaults may be excused, notwithstanding Wainwright, if the state's own rules excuse such default. McKinney v. Estelle, 657 F.2d 740, 742 n.1 (5th Cir. 1981); Clark v. Blackburn, 632 F.2d 531, 533 n.1 (5th Cir. 1980).

661 F.2d 57, 58. The above unmistakably stands for the proposition that a federal habeas court can excuse a procedural default if it can be determined that the

state appellate court had excused a procedural default in an earlier unrelated case.

In the instant case, the lower court sought to excuse (and did excuse) the procedural default, not on the basis that the Florida courts had considered the merits of the issue, but because in another case, decided approximately thirteen years previously, the Florida Supreme Court had excused a procedural default. The cases cited as authority for the lower court's holding, McKinney v. Estelle, 657 F.2d 740, 742, n. 1 (5th Cir. 1981), and Clark v. Blackburn, 632 F.2d 531, 533, n. 1 (5th Cir. 1980), do not hold that procedural defaults may be excused merely because in a previous unrelated case, a state court had excused

a procedural default. What they do hold is that a procedural default may be excused where the state court reaches the merits of the particular litigatant's issue then being considered by the federal court.

The lower court seems to be urging via Clark v. Blackburn, supra, that where a state court can excuse a procedural default because of having a rule or statute authorizing it to do so in certain instances, then a federal habeas court may consider the merits of the issue notwithstanding the Sykes rule. This is but another effort to render Sykes impotent. An effective answer is found in Gruttola v. Hammock, 639 F.2d 922 (2nd Cir. 1981), where the court remarked as follows:

> Under Wainwright v. Sykes, supra, federal courts on habeas review of state convictions will not entertain federal claims on which the state courts have refused to pass due to procedural defaults. Gruttola argues, however, that Wainwright does not preclude our consideration of the merits of his publicity claim because the state appellate courts could overlook the procedural default and in fact passed upon the merits of his publicity claim, albeit in an extremely summary fashion. We disagree. [Emphasis ours.]

Id. at 928, 929.

The lower court cited Brown v. State, 206 So.2d 377 (Fla. 1968), as the case in which the Florida Supreme Court had "excused such procedural default in similar circumstances." 661 F.2d, at 58. Let's put this in proper perspective. In the instant case, no objection whatever was made to the instruction; however, in

Brown v. State, supra, Brown's attorney orally requested a verdict form on larceny. The trial judge in unmistakable language advised that he was not going to give a charge on larceny. Defense counsel then timely objected to the judge's failure to instruct on larceny. Then, in determining that the issue had been properly preserved for appellate review, the Florida Supreme Court remarked as follows:

> It is equally clear that he [trial judge] had no intention of giving the larceny charge regardless of whether a written motion or formally drafted charge were submitted. It would have been a totally useless gesture for counsel to have tendered a prepared instruction. The judge simply refused to give any instruction on larceny.

Id. at 384. It was in this context that

the Florida Supreme Court determined that a lawyer is not required to pursue a completely useless course. The difference between the procedural default, if you can call it that, in Brown and that found in the instant case is too obvious to require further comment.

5. The instant case brings to this Court for review a new principle of constitutional law. It is now error as a matter of constitutional law to allow a jury in a capital case to consider a nonstatutory aggravating circumstance even though permissible under state law at the time of trial. Note the following:

> This appeal requires that we decide whether it is error as a matter of constitutional law

> to allow a jury in a capital case to consider nonstatutory aggravating factors in deciding whether the death penalty should be imposed. We hold that it is and affirm the district court's grant of a writ of habeas corpus.

Henry, 661 F.2d, at 56.

This must be viewed as nothing less than an outright repudiation of this Court's holding in Proffitt v. Florida, 428 U.S. 242 (1976). The Proffitt opinion sets forth the aggravating circumstances fould by the trial judge as follows:

> (1) The murder was premeditated and occurred in the course of a felony (burglary); (2) the petitioner has the propensity to commit murder; (3) the murder was especially heinous, atrocious and cruel; and (4) the petitioner knowingly, through his intentional act, created a great risk of serious bodily harm and death to many persons.

Proffitt, 428 U.S., at 246. This is particularly interesting because the aggravating circumstance of "propensity to commit murder" is not now and never has been a statutory aggravating circumstance under the Florida death penalty statute [§ 921.141, F.S. (1975)]. See Proffitt, 428 U.S. 248, n. 6, which sets forth the statutory aggravating circumstances in effect at the time Proffitt was decided. The unmistakable conclusion is that this Court approved the use of a nonstatutory aggravating circumstance when used along with other statutory aggravating circumstances for the purpose of supporting the imposition of death penalty. This is diametrically opposed to the holding of the lower court.

While it is true that under existing case law in this jurisdiction, only statutory aggravating circumstances may be considered by a jury for the purpose of making a recommendation to the trial judge and used by the judge to support the imposition of the death penalty. Purdy v. State, 343 So.2d 4 (Fla. 1977). Consequently, at the time of respondent's trial, the jury was properly instructed that it could consider a nonstatutory aggravating circumstance.

In Elledge v. State, 346 So.2d 998 (Fla. 1977), the Florida Supreme Court was confronted with a situation where it was necessary to determine whether the use of a nonstatutory aggravating circumstance was constitutionally

permissible. The court then engaged in an exhaustive analysis of Proffitt, concluding as follows:

> It appears that the United States Supreme Court does not fault a death sentence predicated in part upon nonstatutory aggravating factors where there are no mitigating circumstances. The absence of mitigating circumstances becomes important, because, so long as there are some statutory aggravating circumstances, there is no danger that nonstatutory circumstances have served to overcome the mitigating circumstances in the weighing process which is dictated by our statute. [Emphasis ours.]

Id. at 1002, 1003. Consequently, under the reasoned analysis of Proffitt by the Florida Supreme Court, the existence of statutory aggravating circumstances in the absence of mitigating circumstances renders unimportant the existence of

nonstatutory aggravating circumstances. And in respondent's trial, the trial judge found that there were no mitigating circumstances.

The decision of the lower court not only is contrary to the law of this jurisdiction, Brown v. State, 381 So.2d 690 (Fla. 1980), cert.denied, 449 U.S. 1118 (1981), but also contrary to this Court's holding in Proffitt.

CONCLUSION

Petitioner submits that the instant case is appropriate for summary remand with directions to reconsider in light of this Court's decisions in Engle and

Frady. Alternatively, the petition for writ of certiorari should be granted.

Respectfully submitted:

JIM SMITH
Attorney General

By: _____
WALLACE E. ALLBRITTON
Assistant Attorney General

COUNSEL FOR PETITIONER

The Capitol, 1502
Tallahassee, FL 32301-8048
(904) 488-0290

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have furnished the requisite number of copies of the foregoing Petition for Writ of Certiorari to Mr. Craig S. Barnard, Chief Assistant Public Defender, 13th Floor/ Harvey Building, 224 Datura Street, West Palm Beach, Florida 33401, by Air Mail, this 21st day of April 1982.

WALLACE E. ALLBRITTON
Assistant Attorney General

of Counsel

Appendix

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James Dupree HENRY, Appellant,

v.

STATE of Florida, Appellee.

No. 46105

Supreme Court of Florida.

Feb. 25, 1976.

Rehearing Denied April 21, 1976.

Defendant was convicted in the Circuit Court, Orange County, Peter M. deManio, J., of murder in the first degree, and sentenced to death, and he appealed. The Supreme Court, held that where defendant had lengthy history of violence and had demonstrated callous indifference to human life when he assaulted police officer at time of his arrest, and where acts committed were for pecuniary gain and for no other motive other than perhaps to eliminate witness,

death penalty was properly imposed.

Affirmed.

England, J., and Hensely, Circuit Court Judge, dissented.

Homicide key 354

Where defendant convicted of murder had lengthy history of violence of extremely serious nature and had demonstrated his viciousness and callous indifference to human life when he assaulted police officer at time of his arrest, and where acts committed were for pecuniary gain and for no other motive other than perhaps to eliminate a witness, death penalty was properly imposed. West's F.S.A § 921.141.

Richard L. Jorandby, Public Defender, and Richard Lubin and Martin H. Colin, Asst. Public Defenders, for appellant.

Robert L. Shevin, Atty. Gen.; and Wallace E. Allbritton, Asst. Atty. Gen., for appellee.

PER CURIAM.

Having been transferred to this Court by the District Court of Appeal, Fourth District, this cause is before us on direct appeal from a conviction of murder in the first degree and a sentence of death imposed on appellant by the Circuit Court in and for Orange County, Florida. We have jurisdiction pursuant to Article V, Section 3(b)(1), Constitution of Florida (1973).

Appellant was indicted for murder in the first degree in that he did with premeditated design kill and murder Z. L. Riley by suffocating him with a gag, and was found guilty. The majority of the jury recommended that the death penalty

be imposed and the trial judge, having considered the mitigating and aggravating circumstances, sentenced appellant to death.

The victim was found in the bedroom of his home bound and gagged with his throat cut. Two double edge razor blades were lying near his body covered with dried blood.

The pockets of the deceased's pants were turned inside out, but no wallet, money or personal effects were found. Appellant's thumb print was found in the victim's bedroom. In performing an autopsy on the body of the deceased, Dr. Hegert found extensive head and facial wounds, including two fractures of the jaw and mild to moderate brain hemorrhaging caused by "blunt force,"

cuts on the hands, and two deep cuts four and five inches long and several more cuts about the neck consistent with the use of a razor blade. The doctor determined that the actual cause of death was a gag placed tightly under the tongue of the deceased so as to force the tongue back into the throat, cutting off the airway and suffocating the victim.

At the time of the murder, appellant lived next door to the victim. When Officer Ferguson went to arrest appellant at his residence, several days after the murder appellant jumped Ferguson, took his gun, shot Ferguson twice and then fled. He was found an hour later hiding behind a dryer machine, arrested, taken to the Orlando Police Station and advised

of his rights. Before interrogation, he was fully advised of his rights, he signed a waiver card, and he advised the officers that he had killed the deceased, and gave the officers full details of the murder. The officers present testified that no promises or threats were made, and that appellant was not offered any hope of leniency or other reward to induce his statements.

Four days before the trial, he filed a motion to suppress his confession. Before trial, the trial judge conducted a lengthy hearing on the voluntariness of the confession, after which the trial judge denied the motion to suppress. At the conclusion of the state's case, defense counsel moved for a directed verdict of acquittal which was denied.

Relying solely upon the defense of insufficient evidence, appellant did not testify nor call other witnesses. After deliberation for one hour, the jury returned a verdict of guilty. The sentence advisory hearing was then conducted, after which the jury returned a recommendation of the death penalty.

In support of the death sentence, the trial judge entered the following "Findings in Support of the Verdict:"

> "The Court has considered the itemized points for consideration in aggravation and in mitigation set forth in Florida Statute 921.141 and has also considered the jury's recommendation of death and has for the reasons set forth in open court at the time of sentencing and now made a part of the record together with the following reasons, exercised its discretion, and notwithstanding the recommendation of a majority of the jury, has imposed a sentence of death upon the defendant.

"The defendant has a lengthy history of violence of an extremely serious nature which has been demonstrated by the defendant having been charged on a previous occasion with Assault with Intent to Commit a Felony and having been allowed to plead guilty to the lesser included offense of Aggravated Assault, and having also demonstrated his viciousness and callous indifference to human life when he assaulted Officer Ferguson with the Officer's own pistol at the time of his arrest for the charges in this case, at which time he shot the police officer three times, the last time while the Officer was on his knees begging not to be shot any more. The facts in this case in themselves are atrocious, horrible and cruel almost beyond belief. The defendant has clearly demonstrated that he cannot live in a civilized society in a trustworthy fashion and shortly after his release from prison committed the act charged in this case. The act herein was for pecuniary gain

> and for no other motive other than perhaps to eliminate a witness.
>
> "This Court found absolutely nothing of a mitigating nature to prevent this Court from imposing the death penalty.
>
> "It is, therefore, for the above stated reasons and for those reasons stated in open court subsequently transcribed and now attached to these findings, that the death penalty is imposed."

The trial judge, in open court, further described in great detail the reasons for imposing the death penalty which he incorporated by reference in his above stated findings.

We have listened carefully to oral argument, examined and considered the record in light of the assignments of error and briefs filed, and we have also, pursuant to Rule 6.16(b), Florida Appel-

late Rules, reviewed the evidence to determine whether the interests of justice require a new trial, with the result that we find no reversible error is made to appear and the evidence in the record before us does not reveal that the ends of justice require that a new trial be awarded. Cf. State v. Dixon, 283 So.2d 1 (Fla. 1973); Alford v. State, 307 So.2d 433 (Fla. 1974); Wilson v. State, 304 So.2d 119 (Fla. 1974); Williams v. State, 228 So.2d 377 (Fla.1969), and Reddish v. State, 167 So.2d 858 (Fla.1964).

The jury recommended and the trial judge, upon considering all the mitigating and aggravating circumstances, agreed that the death penalty be imposed for the commission of this atrocious and

heinous crime. We find that the judgment and sentence of the lower court in this cause is in accordance with the justice of the cause.

Accordingly, the judgment and sentence of the trial court are hereby affirmed.

It is so ordered.

ADKINS, C.J., ROBERTS, OVERTON and DREW (Retired), JJ., and MELVIN, Circuit Court Judge, concur.

ENGLAND, J., and HENSLEY, Circuit Court Judge, dissent.

James Dupree HENRY, Appellant

v.

STATE of Florida, Appellee.

No. 58126.

Supreme Court of Florida.

Nov. 27, 1979

The Circuit Court, Orange County, Thomas E. Kirkland, J., denied motion for postconviction relief, and petitioner appealed. The Supreme Court held that: (1) contention that death penalty was unconstitutional as applied may be raised in a postconviction petition, and (2) trial court's refusal to conduct a hearing or grant other relief was proper since counsel's hypothetical, unsupported argument had been rejected in prior cases and no preliminary factual basis for the contention was presented to the trial

judge.

Affirmed.

1. Criminal Law key 998(6)

Contention that death penalty is unconstitutional as applied can properly be raised as a subject for consideration in a proceeding for postconviction relief. 34 West's F.S.A. Rules of Criminal Procedure, rule 3.850.

2. Criminal Law key 998(19)

Trial court's refusal to conduct a hearing or grant other relief on issue of whether death penalty was unconstitutionally applied because it was imposed in an arbitrary, capricious and irrational manner based on geography, poverty and other arbitrary factors was proper since the hypothetical, unsupported argument has been rejected as a

legal basis for relief in prior cases and no preliminary factual basis for the contention was presented to the trial judge.

Richard L. Jorandby, Public Defender, and Craig S. Barnard, Chief Asst. Public Defender, West Palm Beach, for appellant.

Jim Smith, Atty. Gen. and Wallace E. Allbritton, Asst. Atty. Gen., Tallahassee, for appellee.

PER CURIAM.

This is an appeal from a denial of James Dupree Henry's motion for post-conviction relief under Florida Rule of Criminal Procedure 3.850. Henry raised, and now seeks review of, twenty issues relating to his trial and original appeal.

[1,2] The circuit court judge ruled that, except for the issue of ineffective assistance of counsel, all the issues either were raised or should have been raised on direct appeal. As to all but one of these rulings, the trial court properly determined that the matters presented may not be attacked in a proceeding for post-conviction relief. Sullivan v. State, 372 So.2d 938 (Fla. 1979). The one issue which was improperly ruled to be foreclosed was Henry's contention that the death penalty is unconstitutionally applied in Florida because it "is imposed in an arbitrary, capricious and irrational manner in Florida based on geography [namely Orange County, Florida], poverty, and other arbitrary factors." This contention can

properly be raised as a subject for consideration in a proceeding for post-conviction relief. We hold, however, that the trial court's refusal to conduct a hearing or grant other relief on this issue was proper under the circumstances. The hypothetical, unsupported argument of counsel has been rejected as a legal basis for relief in Spinkellink v. Wainwright, 578 F.2d 582, 613-14 (5th Cir. 1978), cert.denied, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979), and no preliminary factual basis for the contention was presented to the trial judge in this case.

The circuit court held an evidentiary hearing on the issue of ineffective assistance of counsel and concluded that the evidence and argument

presented to support the assertion lacked merit. Having reviewed that evidence and those arguments, we conclude that the trial court correctly rejected Henry's assertion.

Accordingly, the order of the trial court denying Henry's 3.850 motion is affirmed, and Henry's motion for stay of execution is denied.

Due to the exigencies of this case, we dispense with rehearing.

It is so ordered.

ENGLAND, C.J., and ADKINS, BOYD, OVERTON, SUNDBERG, ALDERMAN and McDONALD, JJ., concur.

James Dupree HENRY, Petitioner
-Appellee Cross-
Appellant,

v.

Louie L. WAINWRIGHT, Secretary,
Department of Corrections,
Respondent-Appellant-
Cross-Appellee.

No. 80-5184.

United States Court of Appeals,
Fifth Circuit.*
Unit B

Nov. 12, 1981.

Florida prisoner under death sentence petitioned for a writ of habeas corpus. The United States District Court for the Middle District of Florida, John A. Reed, Jr., J., granted the writ if the state trial court failed to provide a second sentencing hearing within 90 days of the court's order. Custodian appeal-

ed. The Court of Appeals, James C. Hill, Circuit Judge, held that: (1) failure of defense counsel to object to jury instructions did not preclude federal habeas review of the alleged error in those instructions where the trial judge had indicated in advance that such objection would be fruitless, and (2) the admission of evidence of nonstatutory aggravating factors and jury instructions allowing consideration of any aggravating circumstances, statutory or nonstatutory, violated the Eighth and Fourteenth Amendments.

Affirmed.

*Former Fifth Circuit case, Section 9(1) of Public Law 96-452--October 14, 1980.

1. Habeas Corpus key 30(1)

Where state trial judge overruled defense objection to evidence and made clear his intention to allow such evidence to go to jury, any further objection to jury instructions permitting consideration of that evidence would have been futile and defense counsel's failure to make such objections did not preclude federal habeas review of alleged error in instructions.

2. Constitutional Law key 270(2)

Criminal Law key 1213

In capital case, admission of evidence of nonstatutory aggravating factors and jury instructions permitting consideration of any aggravating circumstances, statutory or nonstatutory, violated Eighth and Fourteenth Amendments. U.S.C.A.Const.Amends. 8, 14.

Wallace E. Allbritton, Charles A. Stampelos, Asst. Attys. Gen., Tallahassee, Fla., for respondent-appellant cross-appellee.

Craig S. Barnard, Chief Asst. Public Defender, 15th Judicial Circuit, West Palm Beach, Fla., for petitioner-appellee cross-appellant.

Appeals from the United States District Court for the Middle District of Florida.

Before HILL, Circuit Judge, SMITH**, Judge, and HENDERSON, Circuit Judge.

JAMES C. HILL, Circuit Judge:

This appeal requires that we decide whether it is error as a matter of constitutional law to allow a jury in a capital case to consider nonstatutory aggravating factors in deciding whether the death penalty should be imposed.

**Judge U.S. Court of Claims, sitting by designation.

We hold that it is and affirm the district court's grant of a writ of habeas corpus.

Appellee James Dupree Henry was convicted of first degree murder on June 26, 1974 in the Circuit Court for Orange County, Florida. At the sentencing hearing, the state called as a witness the arresting officer who, over defense objection, testified that Henry had taken the officer's gun and wounded him in an attempt to avoid arrest. Henry's counsel objected to this testimony on the ground that it constituted a nonstatutory aggravating factor, [1] and the objection

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1. The Florida capital sentencing statute provides that

[a]ggravating circumstances shall be limited to the following:

was overruled. At the close of the hearing, the trial judge instructed the jury as follows:

> [Y]ou will render an advisory sentence to the court based upon the following matters:
>
> Whether sufficient aggravating circumstances exist, or sufficient mitigating circumstances exist for you to recommend the Death Penalty or Life Imprisonment.
>
> In considering aggravating circumstances, you shall consider all factors which are aggravating including, but not limited to, the following:
> . . . .

(a) The capital felony was committed by a person under sentences of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The Defendant knowingly created a great risk of death to many persons.

Record, Vol.VI at 1035 (Emphasis added). The jury recommended the death penalty, and the trial judge filed findings in support of this penalty and entered sentence accordingly.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

After exhausting his state court remedies,[2] Henry applied for a writ of habeas corpus in the United States District Court for the Middle District of

---

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

Fla.Stat.Ann. § 921.141(5) (West Cum.Supp. 1981) (emphasis added). The Florida Supreme Court has construed this section as providing an exclusive list of aggravating factors. Purdy v. State, 343 So.2d 4, 6 (Fla.), cert.denied 434 U.S. 847, 98 S.Ct. 153, 54 L.Ed.2d 114 (1977. We note, however, that this authoritative construction from the state's highest court was not available to the trial judge at the time of Henry's trial.

2. Henry's conviction and sentence were afffrmed on appeal to the Florida Supreme Court. Henry v. State, 328 So.2d 430 (Fla.), cert. denied, 429 U.S. 951, 97 S.Ct. 370, 50 L.Ed.2d 319 (1976). That court also affirmed the state trial court's denial of a motion to vacate the judgment and death sentence. Henry v. State, 377 So.2d 692 (Fla. 1979).

Florida, Orlando Divison. On the basis of the erroneous jury instruction which allowed the sentencing jury to consider nonstatutory aggravating factors, the district court granted the writ if the state trial court failed to provide a second sentencing hearing within ninety days of the court's order.

Louie L. Wainwright, Secretary of the Department of Corrections for the State of Florida, appeals the granting of the writ. Two issues are presented for decision: (1) whether the failure of Henry's counsel to object to the jury instructions precludes federal habeas review of the alleged error in these instructions; and (2) if not, whether the state trial court committed an error of

constitutional dimension in admitting evidence of and permitting jury consideration of nonstatutory aggravating circumstances.[3]

[1] Under Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), failure to comply with a state procedural rule, such as a contemporaneous objection rule, bars federal habeas review of alleged federal constitutional error in admission of the evidence absent a showing of cause for noncompliance and actual prejudice. Appellant Wainwright points out that Henry's counsel failed

3. Because we dispose of these issues in Henry's favor, we need not address the issues raised by Henry's cross-appeal.

to object to the trial judge's instructions to the jury as required by Florida's contemporaneous objection rule[4] and thereby had waived any claim of error in the instructions. This circuit, however, has held that procedural defaults may be excused, notwithstanding Wainwright, if the state's own rules excuse such default. McKinney v. Estelle, 657 F.2d 740, 742 n.1 (5th Cir. 1981); Clark v. Blackburn, 632 F.2d 531, 533 n.1 (5th Cir. 1980).

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4. Florida Rule of Criminal Procedure 3.390(d) provides:

(d) No party may assign as error grounds of appeal the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection . . . .

The Florida Supreme Court has excused such procedural default in similar circumstances. In Brown v. State, 206 So.2d 377 (Fla. 1968), that court held that the failure by accused's counsel to submit as required a request for particular jury instructions did not preclude appellate review of alleged error in the instructions given where the trial judge had already made clear that he would not charge the jury as counsel desired. Id. at 384. The rationale in Brown that "[a] lawyer is not required to pursue a completely useless course when the judge has announced in advance that it will be fruitless," id. (citing Birge v. State, 92 So.2d 819 (Fla. 1957), is equally applicable here. At Henry's

trial, his counsel objected to the testimony of the arresting officer on the grounds that it was evidence of a nonstatutory aggravating factor. Record, Vol. VI at 1012-13. At that time, the trial judge overruled the objection and made clear his intention to allow such evidence to go to the jury. Id. In light of this ruling, any further objection to the jury instructions permitting consideration of nonstatutory aggravating factors would have been futile. As the district court noted, the objection to the arresting officer's testimony was sufficient to put the trial judge on notice that the defense would object to any instructions allowing consideration of this evidence. For these reasons, we hold that the failure

of Henry's counsel to object to the jury instructions does not preclude federal habeas review of the alleged error in the instructions.

II.

[2] We consider now whether the admission of evidence of nonstatutory aggravating factors and the jury instructions permitting consideration of any aggravating circumstances violate the eighth and fourteenth amendments. Appellant Wainwright argues that this court is bound by Florida Supreme Court cases interpreting the Florida capital sentencing statute in which that court has held that consideration of non-statutory aggravating circumstances is harmless error where there are other statutory aggravating factors and no

mitigating factors. See Brown v. State, 381 So.2d 690 (Fla.1980); Douglas v. State, 373 So.2d 895 (Fla.1979); Ellege v. State, 346 So.2d 998 (Fla. 1977). Henry, on the other hand, argues that these cases regarding harmless and reversible error are not relevant to the constitutional issue before us--namely, whether a jury charge permitting consideration of nonstatutory aggravating factors violates the eighth and fourteenth amendments because it fails adequately to channel the jury's discretion in determining whether to impose the death penalty. Agreeing with Henry, we conclude that such a jury instruction contravenes the constitutional directive in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d

346 (1972), and its progeny that jury discretion in capital sentencing be sufficiently guided so as to avoid the arbitrary and selective imposition of the death penalty.

As identified by the Supreme Court in Furman, the evil that must be avoided--the feature which rendered pre-Furman capital sentencing procedures the instrument of cruel and unusual punishment-is the irregular or selective application of the death penalty. Id. at 242, 92 S.Ct. at 2728 (Douglas, J., concurring). Consequently the eighth and fourteenth amendments require states to adopt and follow procedures that minimize the risk of arbitrary and discriminatory infliction of the death penalty and that provide a "meaningful basis for dis-

tinguishing the few cases in which itis imposed from the many cases in which it is not." Id. at 313, 92 S.Ct. at 2764 (White, J., concurring).[5] We believe that permitting the jury to consider whatever evidence of nonstatutory aggravating circumstances the prosecution might desire to present or the jurors might discern in the testimony opens

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5. "The high service rendered by the 'cruel and unusual' punishment clause of the Eighth Amendment is to require legislatures to write penal laws that are evenhanded, nonselective, and nonarbitrary, and to require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups." 408 U.S. at 256, 92 S.Ct. at 2735 (Douglas, J., concurring)(emphasis added).

too wide a door for the influence of arbitrary factors on the sentencing determination. By sanctioning consideration of statutory aggravating factors plus anything else the jury determines to be aggravating, such an instruction broadens jury discretion rather than channels it and obscures any meaningful basis for distinguishing cases in which the death penalty is imposed from those in which it is not.

The Florida Supreme Court acknowledges that the introduction and consideration of nonstatutory aggravating factors is, under its statute, error. See Brown v. State, 381 So.2d 690, 696 (Fla.1980); Elledge v. State, 346 So.2d 998, 1002 (Fla.1977). Based on its interpretation of two footnotes in

Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976),[6] however, it concludes that death sentences partially predicated on nonstatutory aggravating factors do not violate constitutional prohibitions. Ellege v. State, 346 So.2d 998, 1002-03 (Fla. 1977). The Florida court reasons that the essential evil in the use of

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6. In footnote 8 the Court in Proffitt stated that "it is unclear whether the Florida court would uphold a death sentence based entirely on nonstatutory aggravating circumstances," 428 U.S. at 250 n.8, 96 S.Ct. at 2965-66 n.8 (emphasis added), and suggested that such a result seems unlikely. In response to an allegation "that Florida's sentencing system fails to channel the discretion of the jury or judge because it allows for consideration of nonstatutory aggravating factors," the Court further observed that the only Florida Supreme Court case to approve this practice upheld the death penalty only after recasting the trial

such factors is allowing nonstatutory aggravating circumstances to override mitigating circumstances in the weighing process. Id. at 1003. If any substantial[7] mitigating factors are present, the introduction of non-statutory aggravating factors is

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court's six nonstatutory aggravating circumstances into two statutory and two nonstatutory factors. Id. at 256 n.14, 96 S.Ct. at 2968 n. 14.

We cannot agree with the Florida Supreme Court that these passages endorse the use of nonstatutory aggravating factors in the sentencing process as long as other statutory factors are present.

7. In Brown v. State, 381 So.2d 690 (Fla. 1980), the Florida Supreme Court seems to have reduced its requirement in Ellege that there be absolutely no mitigating factors to a requirement that there be no major mitigating factors. See id. at 696.

reversible error since a court is unable to determine whether the death sentence was the result of such improper weighing of the evidence. Where mitigating factors are absent, though, there is no danger that the unauthorized factor tipped the scale in favor of death.

With all due respect to the Florida Supreme Court, we believe that this careful analysis falls wide of the mark, for "our task is not restricted to an effort to divine what motives impelled [this] death penalt[y]. Rather, we deal with a system of law and justice that leaves to the uncontrolled discretion of judges and juries the determination whether defendants committing these crimes shall die or be imprisioned. Furman v. Gerogia, 408 U.S. 238, 253,

92 S.Ct. 2726, 2734, 33 L.Ed.2d 346 (Douglas, J. concurring). Guarding against the arbitrary and discriminatory imposition of the death penalty must not become simply a guessing game played by a reviewing court in which it tries to discern whether the improper nonstatutory aggravating factors exerted a decisive influence on the sentence determination.[8] The guarantee against cruel and unusual punishment demands more.

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8. Compare Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980), cert.granted, ___ U.S. ___, 101 S.Ct. ___, 69 L.Ed.2d ___, 50 U.S.L.W. 3212 (October 6, 1981), in which we vacated a death sentence imposed on the basis of a statutory aggravating circumstance later declared unconstitutional, even though there were two other statutory aggravating factors, either of which by itself was legally sufficient to permit the jury to impose the death penalty. Because it was impos-

In short, appellant's argument in this case seeks this court's approval of a practice that violates the spirit, if not the letter, of Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). In Proffitt the Supreme Court held Florida's death penalty statute constitutional on its face inasmuch as it appeared to provide specific and detailed guidance to the

---

sible to "determine with the degree of certainty required in capital cases that the [improper] evidence ..., together with the instruction, did not make a critical difference in the jury's decision to impose the death penalty," we held that the jury's discretion had not been sufficiently channeled to enable "rational review" of the sentencing process. Id. at 406.

Such a guessing game is the antithesis of the rational review of the jury's application of clear and objective standards contemplated by Furman and its

judge and jury at the sentencing stage. We are bound to disapprove of the trial court's ignoring the limitations imposed by the statute itself and increasing rather than decreasing the risk that the death penalty will be imposed in an arbitrary and capricious manner through the introduction of nonstatutory aggravating circumstances. The Supreme Court of Florida is, properly, the tribunal to rule on that state's

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progeny. See Woodson v. North Carolina, 428 U.S. 280, 303, 96 S.Ct. 2978, 2990, 49 L.Ed.2d 94 (1976) (opinion of Stewart, Powell and Stevens, JJ.). The introduction of extraneous factors not reduced to clear statutory guidelines defeats the goal of consistent application of objective factors.

statutory requirement.[9] Here, however, the limitations of the statute make the death penalty constitutional. Ignoring those limitations thus implicates the constitution.

Because the state trial court committed constitutional error in admitting evidence of and permitting jury consideration of nonstatutory aggravating circumstances, Henry's death sentence

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9. We note as well that we intimate no view on the question whether the Florida legislature might constitutionally add to its capital sentencing statute assault on a peace officer during an attempted arrest as a statutory aggravating circumstance.

must be vacated.[10] For the foregoing reasons, the district court's judgment is

AFFIRMED.

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10. Appellant Wainwright has argued that the jury instructions, even if erroneous, was not an error of constitutional dimension and therefore also has addressed the question of whether an erroneous, though constitutional, jury charge requires reversal of a death sentence. Because we decide the first argument adversely to Wainwright, we need not address the latter argument.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH* CIRCUIT

No. 80-5184

JAMES DUPREE HENRY,

Petitioner-Appellee,
Cross-Appellant,

versus

LOUIE L. WAINWRIGHT, Secretary,
Department of Corrections,

Respondent-Appellant,

Appeal from the United States
District Court

for the

Middle District of Florida

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING
EN BANC

(Opinion November 12, 5 Cir., 1981,
____F.2d____).

(Jan 25 1982)

Before HILL, Circuit Judge, SMITH**, and HENDERSON, Circuit Judge.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ James C. Hill
United States Circuit Judge
*Former Fifth Circuit Case; (Section 9(1) of Public Law 96-452 October 14, 1980.
** SMITH, Judge, United States Court of Claims

Supreme Court of the United States

No. A-730

LOUIE L. WAINWRIGHT, SECRETARY,
DEPARTMENT OF CORRECTIONS,
STATE OF FLORIDA,

Petitioner,

v.

JAMES DUPREE HENRY.

O R D E R

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the order of the United States Court of Appeals for the Eleventh Circuit, case No. 80-5184, entered February 3, 1982 be, and the same is hereby, continued pending the timely filing and disposition of a petition for

a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay is to terminate automatically. In the event the petition for a writ of certiorari is granted, this stay shall continue in effect pending the sending down of the judgment of this Court.

Dated this 23rd day of February, 1982.

/s/ Lewis F. Powell, Jr.
Associate Justice of the Supreme Court of the United States

Opposition

Office - Supreme Court, U.S.
FILED
MAY 20 1982
ALEXANDER L. STEVAS,
CLERK

NO. 81-1995

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

LOUIE L. WAINWRIGHT, ETC.,

Petitioner,

vs.

JAMES DUPREE HENRY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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Counsel for Respondent

QUESTIONS PRESENTED

1. Whether a sentence of death should be vacated because the jury was permitted to consider a nonstatutory aggravating circumstance, then permissible under Florida law, and there were no statutory mitigating circumstances.
2. Whether on collateral attack the assumed futility of objection at the time of trial is sufficient "cause" to excuse Respondent's failure to make timely objection to an alleged erroneous jury instruction.
3. Whether a trial judge because of an objection having been lodged to certain testimony the day before is required to know on the next day, absent an objection thereto, the Respondent would object to an instruction allowing consideration of this evidence.
4. Whether a procedural default in the instant case can be excused because it was determined that the Florida Supreme Court had excused a procedural default in an earlier unrelated case.
5. Whether the announcement by the lower court of a new principle of constitutional law, i.e., that it is error to allow a jury in a capital case to consider a nonstatutory aggravating circumstance even though permissible under Florida law at the time of trial, is contrary to the decision in Proffitt v. Florida, 428 U.S. 242 (1976).

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NO. 81-1995

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

LOUIE L. WAINWRIGHT, ETC.,

Petitioner,

vs.

JAMES DUPREE HENRY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, James Dupree Henry, respectfully opposes the petition for a writ of certiorari filed on April 23, 1982 by petitioner, Louie L. Wainwright, seeking review of the decision of the Eleventh Circuit of Appeals in this case. This brief in opposition is being filed within 30 days after receipt of the petition, as provided by Rule 22.1 of the Rules of this Court.

STATEMENT OF THE CASE

The pertinent facts of the case are set forth in the opinion of the Court of Appeals appended to the petition for a writ of certiorari. 22a to 26a, 29a to 30a.

REASONS FOR DENYING THE WRIT

The lengthy and elaborate certiorari petition in this case finds fault with virtually every detail of the decision and reasoning of the Court of Appeals below. The questions presented are redundant: Number 5 restates Number 1; and Numbers 2, 3, and 4 mischaracterize as separate issues what is only a single holding in Judge Hills' careful opinion for a unanimous court. Under these circumstances, this brief in opposition is limited to what appear to be petitioner's two major points: his attempts to hitch the cart to the horses of Zant v. Stephens [1] and Engle v. Isaac,[2] respectively. Both hitches unravel as soon as they are examined -- Stephens and Engle deal with entirely different questions than those decided below.

In describing the Court of Appeals' decision below as "based on Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980), cert. granted, ... 50 U.S.L.W. 3212 (Oct. 6, 1981)" (Pet. p. 18), petitioner characterizes it unfairly and thereby attempts to manufacture a nonexistent issue. The actual extent of "the lower court's reliance on Stephens" is a "Compare" citation in a footnote (39a), written at a time when certiorari had already been granted in Stephens, and when the Fifth Circuit would surely have awaited this Court's disposition of Stephens if it had deemed the authority of Stephens important to the decision here. And the Fifth Circuit was correct in viewing Stephens as related only tangentially to the issue in Henry. Stephens involves the jury's consideration of one specific impermissible aggravating circumstance, whose content and application to the case in light of the evidence are identifiable, and whose impact therefore might conceivably be assessed by an appellate court and held harmless. Henry involves a jury charge which licences and urges the jury to consider an unknown and unknowable range

1/ Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980), modified, 648 F.2d 446 (1981), cert. gtd, ___U.S. ___, 102 S.Ct. 90 (1981), remand on certified question, ___U.S. ___, 50 U.S.L.W. 4472 (May 3, 1982)

2/ ___U.S. ___, 102 S.Ct. 1558 (1982)

of undefined and unidentifiable aggravating factors,(23a) whose impact is thus beyond appellate appraisal by even the wildest surmise.

Likewise, petitioner's attempt to equate Henry with Engle v. Isaac, supra collapses quickly upon examination. The "futility" issue in Engle (102 S.Ct. at 1572-1574) and the "futility" issue in Henry have nothing at all in common except the single word "futility," which is used in very different senses in the two contexts.

In Engle, no objection was made, and the argument rejected by this Court was that no objection had to be made because an objection would have been "futile" in the sense that the state courts would have overruled such an objection on the merits. In Henry the Fifth Circuit held that a sufficient objection had been made; the Court's statement that "any further objection ... would have been futile" (30a; 661 F.2d at 58) uses "futile" to mean unnecessary or wasteful as a means of calling Henry's federal constitutional objection to the attention of the trial judge, since the objection which Henry's trial counsel made "was sufficient to put the trial judge on notice that the defense would object to any instructions allowing consideration of this evidence [of nonstatutory aggravating circumstances]" (Id.). Engle thus dealt with the general question -- quite appropriate for this Court's review on certiorari -- whether defense counsel's failure to object can be excused on the ground that "he thinks [that the state courts]... will be unsympathetic to the claim" (102 S.Ct. at 1572); whereas Henry raises the issue -- quite inappropriate for this Court's review on certiorari -- whether a particular form of objection made by defense counsel in the highly individualized context of a particular trial was sufficient to bring counsel's point to the attention of the trial judge so as to permit the trial judge to rule on it.

This latter issue is an idiosyncratic one of the sort that arises a dozen times in a dozen different guises in every civil or criminal trial. Its resolution depends upon a

particularized analysis of the individual circumstances of the case -- the language used by counsel; the context which that language was used, as relevant to what the trial judge would have understood the objection to mean and to require the judge to decide; the language used by the trial judge in ruling on the objection, as relevant to whether the trial judge did or did not in fact entertain and decide the objection on the merits.[3/] No general rule is possible or useful in resolving this type of question. It is simply not the type of question that the certiorari jurisdiction of this Court exists to consider. For nine Justices of this Court to parse and reparse the language and circumstances appearing in a unique trial record that has already been examined and interpreted with identical results by a federal district court and by a unanimous federal court of appeals would be a total waste of the scarcest resource in the American justice system, the time and energy of this Court.

Lastly, it may be noted that the Court of Appeal's resolution of the Furman[4/] question raises no issue of the

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3/ An example of the wholly indiosyncratic nature of the issue in Henry, can be seen from this case where the state trial judge, in ruling on the post-conviction motion, made the following finding regarding the adequacy of defense counsel's objection:

> "... the Defense attorney had objected to the evidence of non-statutory aggravating circumstances being presented to the jury, and the objection was overruled. Since the Trial Judge had ruled on this point, no further objection was required." (Emphasis supplied).

In every regard, this case is at the far pole from Engle.

4/Furman v. Georgia, 408 U.S. 238 (1972)

slightest consequence. All that is involved is the application of "Furman's basic requirement" of regularity in the capital sentencing process[5/] to a particular jury instruction which is essentially a freak[6/]

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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5/ Woodson v. North Carolina, 428 U.S. 280, 303 (1976)(plurality opinion). See also Godfrey v. Georgia, 446 U.S. 420, 428 (1980): a capital punishment procedure "...must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance' and that 'make rationally reviewable the process for imposing a sentence of death.'" (footnotes omitted).

6/ The charge to the jury in the present case that it should consider anything in aggravation, without limitation (23a), is plainly an aberration since it is contrary to the standard instructions that are employed in Florida [Florida Standard Jury Instructions in Criminal Cases (2d ed. 1976) & (3d ed. 1981)], and contrary to the Florida Statute which expressly limits consideration of aggravating circumstances. Fla.Stat. §921.141 (5). See also Proffitt v. Florida, 428 U.S. 242, 250 n.8 (1976). The situation in the present case has thus not arisen in any other reported case and is highly unlikely to occur again. Review by this Court in such a narrow and unique case would thus be inappropriate.